United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

75-1399

To be argued by
STEVEN M. SCHATZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1399

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM WOOTEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

William Wooten appeals from a judgment of conviction entered on November 21, 1975 in the United States District Court for the Southern District of New York following a three day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 75 Cr. 670 was filed in six counts on July 7, 1975. The defendant Wooten was named in only Counts One and Three. Count One charged Wooten and six others—Romeo Petrillo, a/k/a "Roy," Margaret Petrillo, Vincent DiDonato, David McLean, Randall Borchardt and John Kelley—with conspiring to distribute controlled substances and narcotic drugs in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 841(b)(1)(B). Count Three charged Wooten, along with David McLean, Randall Borchardt

and Romeo Petrillo, with distributing and possessing with intent to distribute approximately 195 grams of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.*

Trial commenced on October 16, 1975 and concluded on October 20, 1975, when the jury returned a verdict of guilty on both of the counts in which Wooten was charged. On November 21, 1975, Judge Weinfeld sentenced Wooten to concurrent terms of 2 years' imprisonment, six months of which were to be served in a jail-type institution, and the balance of which was suspended. Wooten was also sentenced to a three year term of special parole to commence upon the expiration of his confinement. Wooten is at liberty pending this appeal.

Statement of Facts

The Government's Case.

The Government's proof at trial established that William Wooten lent $2,000 to co-conspirator Randall Borchardt in order to help finance a narcotics transaction. The evidence further established that to protect his investment, Wooten planned the details of, and participated in, a sale of approximately seven ounces of cocaine.

In February 1975, James Greenan, a Special Agent with the Drug Enforcement Administration, infiltrated

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* The defendants Romeo Petrillo, Vincent DiDonato, David McLean and Randall Borchardt pled guilty prior to trial. Randall Borchardt testified at trial for the Government. Defendant John Kelley pled guilty to a superseding information, 75 Cr. 1006, which charged him with a violation of Title 21, United States Code, Section 844. A *nolle prosequi* was filed as to defendant Margaret Petrillo.

a substantial narcotics ring. On February 27, 1975, Greenan purchased four ounces of cocaine for $5800 from Vincent DiDonato, Romeo Petrillo and David McLean. (Tr. 32).* At that time, McLean advised Greenan that his cocaine source lived in uptown Manhattan and that the next sale would be consummated in McLean's apartment. (Tr. 32). On March 4, 1975, Greenan met Petrillo and McLean in McLean's apartment at 1687 Third Avenue, New York, New York. Shortly after his arrival, Greenan was told that a half pound of cocaine would soon be delivered by Petrillo's and McLean's "man" (Tr. 33, 34), but when Greenan advised the two men that he had no money with him, the sale was aborted. (Tr. 33, 34).

Three days later, on March 7, 1975, Greenan again met with McLean and Petrillo at McLean's apartment. Petrillo told Greenan that "his man only had three ounces of cocaine left." Greenan stated that he wanted the whole half-pound package at one time and not just three ounces. (Tr. 35). Petrillo, McLean and Greenan then drove to 62 West 84th Street, where Randall Borchardt's apartment was located. There the fact that only three ounces of cocaine were available for purchase was confirmed, and Greenan refused to consummate the deal, insisting on doing business with the "man." (Tr. 36-37).

On March 9, 1975, Borchardt, who had been McLean's and Petrillo's source of cocaine, asked William Wooten for a $2,000 loan to help finance a marijuana transaction. (Tr. 164, 165). Wooten was aware that Borchardt was dealing primarily in cocaine. (Tr. 170). Later that day, Wooten advanced Borchardt the $2,000. (Tr. 166).**

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* The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; and "Br." to Wooten's Brief.

** Wooten and Borchardt had previously transacted marijuana deals together; indeed, Borchardt was then holding a large quantity of marijuana which he was attempting to resell for Wooten. (Tr. 177).

On the morning of March 10, 1975, Borchardt obtained $6,000 worth of cocaine, $2,000 of which was purchased with the money supplied by Wooten. (Tr. 166). Borchardt then diluted and repackaged the cocaine for sale. Later that morning, Wooten visited Borchardt's apartment to inquire about the status of his $2,000 investment. Borchardt then told Wooten that he had used the money to purchase cocaine and that he had scheduled a cocaine sale on the eastside of Manhattan for 12 o'clock. (Tr. 166).

Wooten then told Borchardt that he wanted to hold a portion of the cocaine as collateral for the $2,000 loan. Wooten, concerned about the safety of his investment, suggested that the cocaine sale be transacted in stages: Wooten would remain at Borchardt's apartment with half of the cocaine, and after the completion of the first half of the sale, Wooten would turn over to Borchardt the remainder of the cocaine. But when Borchardt apprised Wooten of Greenan's prior refusal to purchase less than the full quantity of cocaine, Wooten changed his plans slightly, insisting that he accompany Borchardt to the place of the sale and further insisting that he hold part of the cocaine as collateral. (Tr. 168). Wooten then prescribed the remaining details of the cocaine sale: Wooten would wait outside with half of the cocaine while Borchardt would go inside the apartment building to negotiate the deal. After receiving payment for the first half of the sale, Borchardt would then meet Wooten outside and pay him for the other package. At that point, Wooten would relinquish the remainder of the cocaine. (Tr. 170).

Before leaving Borchardt's apartment, Borchardt showed Wooten a clear plastic bag containing half of the cocaine. (Tr. 169). Wooten and Borchardt then proceeded by taxi to McLean's apartment on Third Avenue. While in the cab, Wooten cautioned Borchardt not to talk about the cocaine. (Tr. 170).

As Borchardt was getting out of the cab, in the vicinity of McLean's apartment, he handed Wooten a plastic bag containing three ounces of cocaine. (Tr. 39, 88, 171). The two men then agreed to meet at Jimmy Murray's Bar which was located nearby. (Tr. 171). After paying for the taxi, Wooten went to the bar to await Borchardt's arrival. (Tr. 250). Borchardt, in the meantime, joined Greenan and Petrillo who had been waiting nearby on the sidewalk; they then entered McLean's apartment.

Once inside McLean's apartment, Borchardt removed a clear plastic bag containing four ounces of cocaine and placed it on a scale. Borchardt told Greenan that he had four ounces of cocaine and that his partner, who had $5,000 invested in the deal, was waiting downstairs with the other three ounces. (Tr. 40-41). Borchardt also informed Greenan that the price of the cocaine was $1,200 per ounce and that Greenan would also have to pay Petrillo and McLean for their part in arranging the deal. Borchardt then apologized to Greenan for initially bringing only the four ounces, stating that his partner "who was downstairs" and who was "a good dope peddler" had insisted that the deal be conducted in two stages. (Tr. 41, 172). Greenan then indicated that while he would not transact the purchase in two stages, he would go downstairs, retrieve his money, and show Borchardt the full amount. (Tr. 172). Greenan then went downstairs and removed from his undercover vehicle the money for the sale.

After Greenan returned upstairs and showed Borchardt the money, Borchardt left the apartment to meet with Wooten who was holding the remainder of the cocaine. (Tr. 42, 173).

When Borchardt arrived at Jimmy Murray's Bar and explained what had transpired, Wooten told him he did not want to transfer the remaining package inside of the

bar. Accordingly, they walked outside. Wooten, at first reluctant to surrender the remaining package without having received any money, was convinced by Borchardt that the deal was in the process of being successfully completed. (Tr. 174). He then handed Borchardt the package containing the remaining three ounces of cocaine and stated that he would meet Borchardt after the deal was over. (Tr. 174).

Borchardt then returned to McLean's apartment, and Wooten walked north on Third Avenue to a grocery store, where he was later observed eating a banana. (Tr. 251, 272).

Upon returning to the apartment, Borchardt displayed the second clear plastic package containing cocaine and placed it on the scale. McLean emptied the contents of the first package into the second package on the scale so that the total package weighed approximately seven ounces. At this point, Greenan paid Borchardt $8400 for the cocaine and paid Petrillo and McLean $200 each for their part in arranging the sale. (Tr. 42, 175).

Borchardt then joined Wooten outside, and the two men returned to Borchardt's apartment on West 84th Street. Inside the apartment, Borchardt returned to Wooten the original $2,000 plus a "two hundred dollar commission." (Tr. 177).*

Borchardt was arrested on May 5, 1975 in his apartment at 28 West 90th Street. Shortly thereafter, Agent Stephen Moran of the Drug Enforcement Administration met Wooten as he was walking up the stairway to Bor-

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* Wooten then asked Borchardt to return marijuana which Borchardt had not, as yet, sold for him, at which point Wooten left Borchardt's apartment with a suitcase containing marijuana. (Tr. 178).

chardt's apartment. (Tr. 254). Wooten was then escorted to Borchardt's apartment where he was officially placed under arrest by Agent Greenan who then advised him of his constitutional rights. Later that day at the Drug Enforcement Administration offices, Agent Greenan showed Wooten surveillance photographs, taken on March 10, 1975, of Wooten eating a banana while he waited for Borchardt outside of McLean's apartment. Wooten denied that the photograph was a picture of him. (Tr. 52, 255).

On May 5, 1975, while at the Federal House of Detention, Wooten and Borchardt discussed the case. Wooten told Borchardt that the only evidence that the law enforcement officials had incriminating him was the photograph of him eating a banana. Wooten tried to convince Borchardt that he was in this predicament only because he had done Borchardt a favor by lending him the $2,000 for the marijuana transaction. (Tr. 181). Wooten suggested that Borchardt take the "brunt" of the blame and state that Wooten had nothing to do with the deal up until the time when Borchardt left McLean's apartment to retrieve the second package. Wooten wanted Borchardt to tell the Federal authorities that Wooten did not know that the package contained cocaine up until that point in time. (Tr. 182).

The Defense Case.

In the robing room, defense counsel informed Judge Weinfeld that he wished to call Assistant United States Attorneys Engel and Weinberg concerning the loss of certain documents. Judge Weinfeld ruled that, under the circumstances, that issue was not a matter "to be tried before a jury." (Tr. 285). Defense counsel then called the defendant's girl friend, Susan Wilhemmer. (Tr. 285-86). After an offer of proof, Judge Weinfeld ruled that the witness' proffered testimony would not be admitted at the trial.

ARGUMENT

POINT I

Judge Weinfeld acted well within his discretion in denying an adjournment in excess of two days.

Wooten contends that he was denied his rights to counsel and to due process by Judge Weinfeld's failure to grant an adjournment. This contention is mistaken both in fact and in law. Indeed, in making this contention, Wooten has failed to advise this Court that Judge Weinfeld granted him a two-day adjournment.

On September 19, 1975, at a pre-trial conference Judge Weinfeld set October 14, 1975 at 10:00 A.M. as the trial date. On October 14, with a jury panel waiting, Wooten failed to appear until after the designated time. When Wooten did appear, he apprised the court for the first time that he wished to obtain new counsel. This failure to timely notify the court occurred even though Wooten had been informed by his counsel ten days earlier that the date for trial was definite. (Tr. Oct. 14, 1975 at 4, 9).

Under the circumstances, Judge Weinfeld found that the application was brought solely for delay:

> "The Court: It seems to me that this is an attempt to delay this trial. It is not going to be delayed.
>
> * * * * *
>
> The Court: September 19 was the date this case was set for trial. Mr. Grimes has just stated to the Court that you were notified I believe at least 10 days ago of the date for trial.
>
> Is that correct, Mr. Grimes?
>
> Mr. Grimes: Yes sir.

> The Court: *This seems to me to be a ploy just to put this case over.* I am not going to permit it.
>
> If you have another attorney you want to bring in to sit with Mr. Grimes—I am not going to relieve Mr. Grimes now. . . ." *Id.* at 4-5 (emphasis supplied).

Judge Weinfeld further stated:

> "The Court: I don't understand it all. It is quite obvious to me what's going on here. You are just trying to put this case over and delay it, and I am not going to permit any delay." *Id.* at 7.*
>
> * * * * *
>
> "I am quite well satisfied that this whole setup is simply to delay the trial and it isn't going to delay the trial. I will give you from this morning until Thursday morning. That is 48 hours." *Id.* at 10.

Judge Weinfeld acted with restraint and reason. He ordered Wooten's then counsel, Mr. Grimes, to remain in the case until excused and granted Wooten a two-day adjournment notwithstanding the finding that the adjournment was made for the purpose of delay.

Moreover, even if it were assumed that Wooten's application was made in good faith, a two-day adjournment provided ample time to prepare for the trial. The entire case from opening statements through summations lasted only 2 days. Essentially Wooten was charged with par-

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* The finding that the request for an adjournment was for the purpose of delay is also supported by Wooten's lack of forthrightness on the issue. Originally Wooten stated to the court that he had never been informed that the case was set for trial. *Id.* at 3. However, when his own attorney confronted him with the truth, he admitted that he had been told of the date ten days earlier. *Id.* at 9.

ticipating in a one-buy cocaine transaction with the events of only two days at issue. Furthermore, to expedite matters, the Government supplied defense counsel with all "Jencks Act" material two days prior to trial.*

It is settled that "[d]isposition of a request for continuance . . . is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed." *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940);** see also *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *United States* v. *Cimono*, 321 F.2d 509 (2d Cir. 1963), *cert. denied as*, *D'Ercole* v. *United States*, 375 U.S. 967 and *Cimono* v. *United States*, 375 U.S. 974 (1964). An abuse of discretion will be found only if "the trial Judge acted arbitrarily and substantially impaired defendant's ability to defend himself." *United States* v. *Ellenbogen*, 365 F.2d 982, 985 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967). Moreover, this Court has repeatedly cautioned that "[j]udges must be vigilant that requests for appointment of a new attorney on the eve of trial should not become a vehicle for achieving delay." *United States* v. *Llanes*, 374 F.2d 712, 717 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). See also *United States* v. *Maxey*, 498 F.2d 474 (2d Cir. 1974).

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* Indeed, the trial court noted that it was "extraordinary" for defense counsel to receive the 3500 material for all the witnesses forty-eight hours in advance of trial. (Tr. 10).

** Inexplicably, Wooten relies on *Avery* v. *Alabama*, *supra*. In *Avery*, the Supreme Court affirmed a murder conviction in a case in which defense counsel were appointed on a Monday, the date defendant was arrested, and the case proceeded to trial three days later on Thursday. The Court rejected the contention that the denial of a continuance violated due process by denying petitioners "the right to counsel, with the accustomed incidents of consultation and opportunity of preparation for trial." 308 U.S. at 445. Here the case was set for trial four weeks earlier and

[Footnote continued on following page]

Plainly, in the circumstances of this case, Judge Weinfeld did not abuse his discretion by granting a two day adjournment. The trial date had been set a month earlier and the defendant knew of the date at least ten days prior to trial. Furthermore, this was not a case in which there existed voluminous amounts of material to review in preparation for trial. *Cf. United States* v. *Tramunti*, 513 F.2d 1087, 1116-18 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (Oct. 7, 1975).

Judge Weinfeld found Wooten's application to be made for the purpose of delay.

The other authority upon which Wooten relies to support his denial of counsel claim is equally inapposite: In *Powell* v. *Alabama*, 287 U.S. 45 (1932) "until the very morning of trial no lawyer had been named or definitely designated to represent the defendants." 287 U.S. at 56. Rather the trial judge had made a vague appointment of "all the members of the bar" for the purpose of arraignment. *Id.* Moreover, the Court found that an effective appointment of counsel was not even made on the day of trial. *Id.* at 57. Under the circumstances, the Court ruled that the trial court failed to make an effective appointment of counsel.

Caraway v. *Beto*, 421 F.2d 636 (5th Cir. 1970) was a case involving ineffective assistance of counsel where defense counsel only met with the defendant for fifteen minutes prior to trial and then only to discuss the advisability of pleading guilty. At trial, defense counsel made no objections to the admissibility of certain evidence which was of dubious relevancy. Here, trial counsel was both diligent and energetic in his defense of Wooten.

Finally, in *Lee* v. *United States*, 235 F.2d 219 (D.C. Cir. 1956), the District of Columbia Circuit reversed a trial court's refusal to grant a continuance over the weekend so that defendant could find counsel of his choosing. Here, Judge Weinfeld granted a two-day adjournment to enable Mr. Michaels, Wooten's counsel of choice, to prepare for trial.

POINT II

The indictment in this case is valid in all respects.

Wooten claims that the indictment in this case was predicated upon perjured testimony and that, accordingly, the indictment must be dismissed. This claim is utterly devoid of merit.

At trial Agent James Greenan testified that Randall Borchardt handed Wooten a package of cocaine as Borchardt exited the taxi. Specifically Greenan testified at trial as follows:

> "As the fellow in the blue ski jacket who was Randall Borchardt exited the cab, I observed him hand a clear plastic package with white powder to the man—to Mr. Wooten, who was wearing a long black coat". (Tr. 39).

On cross-examination, defense counsel sought to impeach Greenan with the following question and answer from his grand jury testimony:

> "Q. Did Mr. Borchardt hand a clear plastic bag to Mr. Wooten as they both got out of the car? A. That's correct." (Tr. 89).

The following colloquy then occurred between defense counsel and Greenan:

> "Q. Well, was that your testimony at the time? A. Yes, it was.
>
> Q. Was it true? A. It was not true.
>
> Q. It was not true. But you swore to it, A. Yes, I did.
>
> Q. Just as you are swearing now? A. That's correct.

> Q. In fact, they didn't get out of the cab together did they? A. No, they did not." (Tr. 89).

Defense counsel further inquired as follows:

> "Q. But somehow you just failed to remember who had gotten out of the cab or whether they were together? A. I answered the question posed to me by the U.S. Attorney in the grand jury.
>
> Q. But you answered it falsely; is that correct? A. I wasn't entirely correct in my response.
>
> Q. Is that because you didn't remember exactly? A. The——
>
> Q. Mr. Greenan, was it deliberate or accidental? A. It was not deliberate." (Tr. 91).

The core of Wooten's contention is that the indictment must be dismissed because at trial Agent Greenan testified that Borchardt handed Wooten the package of cocaine while Borchardt was exiting the taxi, whereas before the grand jury Greenan testified that the transfer took place when both Borchardt and Wooten got out of the cab. At the outset it should be noted that Wooten at no time before, during or after the trial claimed that Greenan's misstatement before the grand jury required dismissal of the indictment. Accordingly, any claim that he might have raised concerning this matter has been waived. See, *e.g.*, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

But even if the claim had been timely raised below, it would have been promptly rejected. First, it has long been settled that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); See *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *Holt* v. *United States*, 218 U.S. 245 (1910).

Secondly, even assuming that an exception to this well-settled principle might be created to permit attacks on indictments based principally on perjured testimony, see *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), Wooten has not and could not, make a showing (1) that Greenan's misstatement was anything but inadvertent, or (2) that the inaccuracy was in any way material to securing the indictment. *Cf. United States* v. *Pond*, 523 F.2d 210, 213 (2d Cir. 1975); *United States* v. *La Vecchia*, 513 F.2d 1210, 1217-18 (2d Cir. 1975); *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973).* There is no reason whatsoever to disbelieve Greenan's trial testimony that the mistake in the grand jury was not deliberate. The question whether the package was handed to Wooten as Borchardt was getting out of the cab alone or as Borchardt was getting out of the cab with Wooten was hardly a matter for which there would be any motive to lie.** Moreover, there was ample evidence before the grand jury, aside from Greenan's testimony, linking Wooten to the activities of March 10, 1975. The grand jury was presented with evidence of Borchardt's statements of March 10, 1975 concerning his "partner" downstairs and were also shown the photographs of Wooten outside of McLean's apartment on the date of the sale.***

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* Indeed, logic impels the conclusion that the variance was both immaterial and inadvertent. It would be novel and potentially pernicious doctrine indeed, if every minor inconsistency between trial and grand jury testimony were transmuted, by the process of hyperbole, into perjury.

** It is pertinent that at trial Borchardt himself testified that he handed Wooten the package containing the three ounces of cocaine as he exited the cab. (Tr. 171).

*** *United States* v. *Harris*, 368 F. Supp. 697 (E.D. Pa. 1973) upon which Wooten also relies is totally inapposite. *Harris* involved the duty of a prosecutor to correct the trial testimony of cooperating witnesses who had misstated the contours of the arrangement which had been entered into with the Government. 368 F. Supp. at 713.

POINT III

The prosecution acted properly in all respects.

Wooten claims that the actions of the prosecutor warrant reversal. (Br. at 15). This claim is utterly frivolous. A review of the record reveals that the prosecution of this case was both fair and proper in all respects.

A. The opening statement of the prosecutor.

Relying on *Reeves* v. *Warden*, 346 F.2d 915 (4th Cir. 1965), Wooten claims that the Government's "opening statement was so prejudicial as to preclude any possible deliberation of the jury which would be free from taint." (Br. at 16). Specifically, Wooten challenges as prejudicial a statement in the Assistant United States Attorney's opening that "the government will present evidence that will show that the defendant William Wooten raised substantial money for and participated in a large cocaine deal." (Tr. 23).

As previously indicated, the evidence at trial demonstrated that on March 9, 1975 Wooten loaned Randall Borchardt $2000 for a marijuana transaction; that on March 10, 1975 Borchardt used the $2000 to purchase cocaine; and that upon learning of the use to which the $2000 had been put, Wooten constructed a plan to protect his investment. That plan included accompanying Borchardt to the place of the sale and holding, as collateral, half of the cocaine. In light of these facts, the challenged statement was a substantially accurate account of what in fact occurred in this case.

However, even assuming *arguendo*, that the challenged language, if considered in isolation, might be viewed as ambiguous, the prosecutor's opening statement

went on to set out in detail the proper sequence of events proved at trial including the facts that initially Borchardt had "asked the defendant William Wooten to invest in a marijuana deal" and that subsequently "Borchardt told Wooten that the money had been used to buy cocaine." (Tr. 25). Thus, if any confusion may have arisen from the challenged statement to the extent that it implied that the $2000 loan was initially intended by Wooten to be for the purchase of cocaine, not marijuana, it was surely remedied by the prosecutor's own remarks. Furthermore, after all of the evidence had been introduced and closing summations heard, the jury certainly understood the sequence of events as they actually occurred.*

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* The contrast between the facts in *Reeves* v. *Warden, supra,* and those before this Court underscores that Wooten was in no way prejudiced by any remarks in the opening statement. In *Reeves,* a rape case in which the defendant relied on an alibi defense, the prosecutor, in his opening statement, placed heavy emphasis on a yellow slip of paper, allegedly belonging to the defendant, which set out a schedule of activities on the date of the crime. The evidence at trial revealed that, in fact, the note had been authored by the defendant's sister. Under the circumstances, the court ruled that:

> "We think a prosecutor who boldly asserts at trial that a particular piece of evidence will prove his charges and who subsequently introduces that evidence is *under an obligation to correct the impression he may have created* when later developments clearly show that his prior assertions regarding that piece of evidence were incorrect and misleading... The state's attorney in this case... never did anything affirmatively to withdraw or abandon the note after Officer Ford's testimony about its authorship...." 346 F.2d at 922 (citation omitted) (emphasis supplied).

Here, the challenged statement did not pertain to a highly incriminating piece of evidence. At most, it was a slightly unclear capsulization of the events in question. Moreover, unlike *Reeves,* here any defect was remedied in the very opening which contained the challenged statement. The more detailed account of the projected evidence rendered abundantly clear the facts as they had occurred.

Indicative of the baselessness of Wooten's claim is the fact that trial counsel at no time saw fit to object below to the remark now assigned as prejudicial in this Court. When a challenge is raised to a statement in a Government's summation for which there has been no objection raised below, the standard of review on appeal is whether the challenged statement was "so 'extremely inflammatory and prejudicial' . . . that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings' [citations omitted]." *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972). See also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *United States* v. *De Alesandro*, 361 F.2d 694, 697 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966); *United States* v. *Somers*, 496 F.2d 723, 737-38 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974); *United States* v. *Dabney*, 393 F. Supp. 529 (E.D. Pa. 1975). This standard is no less appropriate when the unobjected to remarks occur in the Government's opening; applying that standard to this case plainly requires rejection of Wooten's claim.

B. There was no willful destruction of evidence by the prosecutor.

Without citing any precedent, Wooten seeks reversal on the grounds that "[t]he prosecution could not produce records of statements made by one of their witnesses who had admittedly told several versions of the same story." (Br. at 16). This contention is entirely meritless.

Prior to the commencement of trial, the Assistant United States Attorney apprised defense counsel and the court that a prearraignment interview sheet for Randall Borchardt which once existed could not be located. (Tr.

2). Both the court and counsel were apprised that the Assistant United States Attorney who had completed the interview sheet and the Assistant United States Attorney who previously had been in charge of the prosecution of this matter and who had misplaced the document had combed their files in an attempt to locate the document. (Tr. 2). Further, both the court and counsel were apprised that according to the best recollection of both Assistants, the Drug Enforcement Agent who witnessed the interview, and counsel for Borchardt, who was present at the interview, the document had merely contained pedigree and personal history information. (Tr. 2-3, 6). The Assistant who tried the case further stated that he had provided defense counsel prior to trial with all the 3500 material in the case, including material containing statements of Borchardt made at the time of his arrest. (Tr. 3).

Judge Weinfeld ruled that defense counsel could interview, outside the presence of Government counsel, the two Assistants who had knowledge of the statement, and Agent Greenan, who had been present at the interview. (Tr. 7, 17-18).*

Notwithstanding the fact that Judge Weinfeld had ordered the appropriate Government personnel available for interviews, at no time did defense counsel request a hearing concerning the circumstances surrounding the loss of the interview sheet.

At trial, defense counsel questioned both Greenan and Borchardt extensively concerning any statements which

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* Defense counsel also sought to interview Borchardt prior to trial. The Government took the position that Borchardt's availability for a pre-trial interview was a decision for Borchardt and his counsel. (Tr. 16, 160). Borchardt's attorney stated that he had discussed the matter with his client and that his client did not wish to meet with defense counsel. (Tr. 160).

Borchardt may have made to the United States Attorney's Office; he also brought to the jury's attention the fact that Borchardt had changed his story over a period of time.* (Tr. 75-76, 150-51, 227-28, 231). On cross-examination, Agent Greenan testified that he was present on May 6, 1975 at the U.S. Attorney's office when an interview sheet for Randall Borchardt was being made out. (Tr. 149-51). Greenan also testified on cross-examination that in October 1975 Borchardt had told him he had lied with respect to certain matters. (Tr. 75-76). In the same vein, Borchardt was questioned extensively on cross-examination about any statements he had made; he testified that to his best recollection he made no substantive statements to the Assistant United States Attorney at his pre-arraignment interview. (Tr. 227). Borchardt was also interrogated at length concerning the different versions of the story which he had told including his original statement that Wooten had invested $5000 in the deal whereas in fact he had invested $2000. (Tr. 231-32).

It is, of course, well-settled that not every loss of a document requires an imposition of sanctions against the Government. See *United States* v. *Augenblick*, 393 U.S. 348 (1969); *United States* v. *Comulada*, 340 F.2d 449 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965); *United States* v. *Covello*, 410 F.2d 536, 545 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Jones*, 360 F.2d 92, 95 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967); *United States* v. *Perry*, 471 F.2d 1057 (D.C. Cir. 1972). Indeed, in *United States* v. *Miranda*, Dkt. No. 74-2651, slip op. 6545 (2d Cir., December 3, 1975), this Court recently affirmed a trial court's refusal to sup-

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* It was the Government's contention that to the extent Borchardt's original version of the facts was inaccurate, it was due to requests by Wooten that Borchardt bear the "brunt" of the blame. (Tr. 132).

press certain testimony concerning a conversation between the defendant and an informant despite the loss of a tape of that conversation. The conviction in *Miranda* was affirmed even though defense counsel had not been apprised of the lost tape until the middle of trial. The Court stated:

> "Whether or not sanctions for nondisclosure should be imposed depends in large measure upon the extent of the Government's culpability for failure to make disclosable material available to the defense, on the one hand, weighed against the amount of prejudice to the defense which resulted, on the other hand." *Id.* at 6554.

Cf. United States v. *Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3207 (U.S. Oct. 7, 1975); *United States* v. *Morell*, 524 F.2d 550, 553-54 (2d Cir. 1975).

Here, there can be no claim that the Government acted in bad faith. Counsel was promptly advised that the document could not be located and that it contained only questions pertaining to pedigree and personal history. The two Assistant United States Attorneys, who had familiarity with the missing document, and Agent Greenan were made available for interviews. If defense counsel had wished to pursue the matter further, he could have requested a hearing outside the presence of the jury. His failure to do so is indicative of his perception of the Government's good faith.

In addition, Wooten suffered no prejudice from the loss of the document. The record convincingly demonstrates that the interview sheet contained only pedigree and personal history information. Moreover, defense counsel had ample opportunity to cross-examine Greenan

and Borchardt both as to the fact that notes were taken at the May 6, 1975 interview and that Borchardt had modified his recitation of the events which had resulted in his and Wooten's arrests.

C. The Government did not attempt to link the drugs found in Borchardt's apartment to Wooten.

Wooten claims that "the government attempted to link up Wooten with drugs found in Borchardt's apartment." (Br. 17). This is factually in error.

On direct examination of Agent Greenan, the Government merely elicited that Borchardt was arrested at 28 West 90th Street, Apartment 4-F, and that Wooten was arrested in the same building. (Tr. 45-46). In its direct examination of Greenan, the Government did not elicit the fact that drugs were found in Borchardt's apartment.

In contrast, defense counsel, in his cross-examination, repeatedly brought out that there were drugs at 28 West 90th Street. For example, the following exchange took place during the cross-examination of Greenan:

> "Q. Do you know when he was arrested whether he had any drugs in his possession or in the vicinity of his possession? A. When he [Wooten] was arrested, yes, there were drugs in the vicinity of him.
>
> * * * * *
>
> Q. When you referred to the vicinity before, you meant elsewhere in the same building? A. I mean an apartment.
>
> Q. Did you arrest Mr. Wooten? A. Yes, I did.
>
> Q. And was that inside an apartment? A. Yes, it was." (Tr. 70-71). (See also Tr. 137, 140-42).

At another point, defense counsel elicited, during Greenan's cross-examination, over the Government's objection, that bags of marijuana and 46,000 pills were found in Borchardt's apartment. (Tr. 140-42). Indeed, at one point, during Greenan's cross-examination, Judge Weinfeld noted with respect to the introduction of testimony concerning other drugs:

> "The Government hasn't proved it. If you want to prove it for the Government I will allow it." (Tr. 142).

Thus, there is no factual basis for Wooten's claim that the Government attempted to link the drugs found in Borchardt's apartment at 28 West 90th Street with Wooten. As Judge Weinfeld stated, it was the defense itself which elicited this testimony.

The Government can hardly be assigned responsibility for evidence adduced by the defense. *Cf. United States* v. *Lubrano*, Dkt. No. 75-1158, slip. op. 1361, 1367 (2d Cir., Dec. 30, 1975); *United States* v. *Malizia*, 503 F.2d 578, 581 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975).

POINT IV

Judge Weinfeld correctly refused to admit certain evidence offered by the defense.

Wooten claims that Judge Weinfeld was in error when he refused to admit testimony concerning the loss of Borchardt's pre-arraignment interview sheet and testimony, by Wooten's girlfriend, to the effect that she and Wooten had previously reported one of the surveillance agents for "planting" evidence (Br. at 18). This claim is baseless.

As was discussed in Point III, *supra*, defense counsel was permitted at trial to cross-examine both Agent Gree-

nan and Randall Borchardt at length both as to the fact that notes were taken at the May 6, 1975 interview of Borchardt and that Borchardt had changed his story over a period of time. (Tr. 75-76, 150-51, 227-28, 231).

In addition, prior to the commencement of the trial, the Government had asserted that, according to the recollections of the participants, the May 6th interview was confined to matters of pedigree and personal history. Judge Weinfeld ordered that the two Assistant United States Attorneys who had knowledge of the statement and Agent Greenan be made available for interviews. (Tr. 7, 17-18).

Notwithstanding this opportunity, at no time, did defense counsel choose to ask for a hearing either to show that the interview pertained to substantive matters or that the loss of the document was anything but a good faith loss.

Accordingly, Judge Weinfeld ruled as follows:

> "The Court: I will not permit the jury to hear the evidence as to whether or not it was lost. You presented that matter yesterday. I made available to you all the witnesses in the case who had any knowledge of it. This is not to be tried before the Jury." (Tr. 285).

This ruling was perfectly proper, since defense counsel had already been given an opportunity at trial to question two witnesses concerning the May 6, 1975 interview. If there was any claim that the interview dealt with the substance of the case or that the loss was not in good faith, then defense counsel could have requested a hearing. *Cf. United States* v. *Covello, supra*, 410 F.2d at 545; *United States* v. *Augenblick, supra*, 393 U.S. at 355. In light of defense counsel's refusal to pursue the course made

available to him, Judge Weinfeld certainly did not abuse his discretion. The probative value, if any, of testimony concerning the loss of the document would have been clearly outweighed by its distracting impact. See *Hamling* v. *United States*, 418 U.S. 87, 124, 127 (1974); *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, — U.S. — (44 U.S.L.W. 3358, Dec. 16, 1975); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 279, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Mahler*, 363 F.2d 673, 676-78 (2d Cir. 1966); *United States* v. *Bowe*, 360 F.2d 1 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); Fed. R. Evid. 403.

Wooten also objects to Judge Weinfeld's refusal to permit the testimony of Wooten's girlfriend Susan Wilhemmer. (Tr. 287-88). According to defense counsel's offer of proof, Ms. Wilhemmer would have testified that about seven months prior to the events charged in the indictment, Wooten and Ms. Wilhemmer reported to the Drug Enforcement Administration and to the United States Attorney's Office that one of the surveillance agents in this case, Agent O'Connor, "appeared to them to be planting evidence." (Tr. 288).

On cross-examination of O'Connor, defense counsel failed to make any reference to this claim, even to inquire whether O'Connor might have had an inkling of this event. Furthermore, O'Connor's contribution to the trial was limited to his testimony that he observed Wooten arrive with Borchardt on March 10, 1975 and that later that day Wooten left Borchardt's apartment on West 84th Street carrying a large blue suitcase. (Tr. 280). It is significant that during O'Connor's cross-examination, he testified that he never saw Borchardt hand the package of cocaine to Wooten. (Tr. 282-83). Indeed, O'Connor's testimony fills less than seven pages of transcript and was not seriously contested at trial. (Tr.

277-84). At most O'Connor corroborated the essentially uncontested fact that Borchardt was in the vicinity of McLean's apartment on March 10, 1975.

Under the circumstances, it was well within Judge Weinfeld's discretion to exclude this testimony, particularly since no foundation had been laid on cross-examination even to suggest that Agent O'Connor knew of the charge. See *United States* v. *Kahn*, *supra*, 472 F.2d at 279, 281-82; *United States* v. *Hayutin*, 398 F.2d 944, 953 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); 3A Wigmore, Evidence § 953 (Chadbourne rev. 1970).

Moreover, given the limited and essentially uncontested nature of O'Connor's testimony "the offer presented the very real danger of degenerating into a side trial." *United States* v. *Kahn*, *supra*, 472 F.2d at 279. In this context it was clearly within Judge Weinfeld's discretion to rule that the proferred testimony would only send the jury off on an unnecessary and time-consuming detour. See *Hamling* v. *United States*, *supra*; *United States* v. *Green*, *supra*; *United States* v. *Kahn*, *supra*; *United States* v. *Mahler*, *supra*; *United States* v. *Bowe*, *supra*.*

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* The only authority upon which Wooten relies, *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975) is totally inapposite. In *Seijo*, the Court of Appeals ordered a new trial in a case in which a cooperating defendant had falsely testified that he had no prior criminal record and where the prosecution had inadvertently failed to apprise the court to the contrary. Here the proffered testimony of Ms. Wilhemmer was of dubious probative value, and there is no suggestion that Agent O'Connor testified other than candidly.

POINT V

The trial judge did not commit error in his charge.

Wooten contends that Judge Weinfeld's "instructions to the jury were confusing and misleading." (Br. at 19). On the contrary, the charge by the learned and experienced trial judge was proper in all respects.

At the outset, Wooten raises a "technical error" in that during the course of his charge concerning reasonable doubt, Judge Weinfeld stated:

> "If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of the defendant's guilt—in sum, if you have such doubt which would cause you as prudent persons to hesitate before acting in matters of important to yourselves—*then you have a reasonable doubt, and in that circumstance it is your duty to convict.*" (Tr. 328) (emphasis supplied).

In the context of the entire charge this inadvertent slip of the tongue could hardly have been misconstrued by the jury. Significantly, no exception was taken to this portion of the charge. Indeed, only moments before, Judge Weinfeld had flawlessly instructed the jury on the Government's burden of proof and the presumption of innocence. (Tr. 327). At most this constituted a *lapsus linguae* which was harmless beyond any reasonable doubt. *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974); *United States* v. *Glaziou*, 402 F.2d 8, 18 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); *cf. Cupp* v. *Naughton*, 414 U.S. 141, 146-47 (1973); *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974); *United States* v. *Joly*, 493 F.2d 672 (2d Cir. 1974).

Wooten also takes issues with Judge Weinfeld's use of the term "the proof indicates." (Br. at 19). That term was used in the following context:

> "To become a member of a conspiracy a defendant need not know all the other members, their respective roles in it, nor all the details of the conspiracy.
>
> Thus, in this case the proof indicates that the defendant knew only Borchardt, one of the alleged co-conspirators." (Tr. 336).

It is difficult to fathom the precise basis of Wooten's claim. That Wooten knew Borchardt was not in dispute at any time during the course of the trial. Indeed, the evidence of their relationship was overwhelming. Judge Weinfeld was not, as Wooten suggests, determining "the inferences which may be drawn from the facts" (Br. at 20); rather at most Judge Weinfeld was providing the jury with an illustration to clarify the issues before it.

Wooten also asserts that Judge Weinfeld gave

> "the jury two alternative theories under which it may find the defendant guilty. The first theory allows the jury to consider all of the evidence submitted, while the second theory is predicated upon the fact that the jury need not believe the evidence, given by the co-conspirator Borchardt." (Br. at 20).

The apparent basis for this claim is that after Judge Weinfeld charged the jury concerning the testimony of accomplices, including a charge that "the testimony of an alleged accomplice should be viewed with great caution and scrutinized carefully," (Tr. 356), the judge charged that "the government contends that entirely apart from Borchardt's evidence, the testimony of the law enforcement agents is sufficient to sustain the charge." (Tr. 357).

By so instructing the jury, Judge Weinfeld was exercising his prerogative to summarize the contentions of counsel and marshall the evidence.* Judge Weinfeld was scrupulously fair in not only setting out the contentions of both sides, but also in warning the jury that they should consider all the evidence in the case and that it was their recollection which controlled. (Tr. 352-54, 364-65). Clearly no abuse of discretion was committed. See *United States* v. *Tourine*, 428 F.2d 865, 869, 870 (2d Cir. 1970), *cert. denied as Burtman* v. *United States*, 400 U.S. 1020 (1971); *United States* v. *Dardi*, 330 F.2d 316, 330 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).**

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* Wooten's assertion that "if the evidence of the co-conspirator were not to be believed, there would be no linking of the contraband with the defendant Wooten" (Br. at 20-21), ignores both Agent Greenan's testimony that he observed Borchardt handing a clear plastic package containing white powder to Wooten as they arrived outside of McLean's apartment, (Tr. 39), as well as the testimony of the surveillance agents who observed Wooten meet with Borchardt outside of McLean's apartment. (See, *e.g.*, Tr. 250).

** Wooten's other contentions are equally meritless. Wooten was charged in a conspiracy to distribute cocaine and marijuana. Accordingly, it was proper for Judge Weinfeld to charge the jury with respect to both substances. (Tr. 338). Moreover, as was previously discussed, it was the defense that brought out that there was marijuana in Borchardt's apartment. (Tr. 70-71, 137, 140-42). Furthermore, Borchardt testified that Wooten had initially loaned the money for a marijuana transaction and that he was holding a portion of Wooten's marijuana for resale. (Tr. 164, 177).

Also, it was entirely proper for Judge Weinfeld to require written Requests to Charge. See Rule 30, Fed. R. Cr. P.

POINT VI

The evidence against Wooten was overwhelming.

Wooten also claims that the Government did not prove Wooten's guilt beyond a reasonable doubt and that "if the jury disregarded the testimony of Borchardt, then the remaining witnesses did not establish a prima facie case against Wooten." (Br. at 22). This contention is frivolous.

As is set forth in detail in the statement of facts, the evidence against Wooten was abundant. In addition to Borchardt's testimony, which provided an inside view of the conspiracy, Agent Greenan testified that he saw Borchardt, as he was exiting the taxi, hand Wooten a clear plastic package containing white powder. (Tr. 39). Further, the testimony of the surveillance agents placed Wooten outside of McLean's apartment on the day of the sale. (Tr. 249-51, 271-72, 279). Finally, Wooten gave a clearly false exculpatory statement in denying that he was the individual in the photograph eating a banana. (Tr. 52, 255).

As Judge Weinfeld ruled in denying Wooten's motion to dismiss, the evidence against Wooten was more than sufficient. (Tr. 284).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 614—350—620

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STATE OF NEW YORK)
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Steven M. Schatz being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of March, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

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Steven M. Schatz

Sworn to before me this
10th day of March 1976
Alma Hanson

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